

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs March 28, 2006

**ARTHUR W. STAMEY, III v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Bradley County**  
**No. 04-418 R. Steven Bebb, Judge**

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**No. E2005-02261-CCA-R3-PC Filed April 7, 2006**

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The petitioner, Arthur W. Stamey, III appeals the post-conviction court's denial of post-conviction relief. On appeal, he alleges that he entered an unknowing and involuntary guilty plea, received the ineffective assistance of counsel, and received an illegal sentence. Following our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court denying post-conviction relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Robin Ruben Flores, (at trial) Chattanooga, Tennessee, and Arthur Stamey, III, (on appeal) Pikeville, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Jerry N. Estes, District Attorney General; and Kristie Luffman, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

***Facts and Procedural History***

On February 3, 2004, the petitioner pled guilty to aggravated sexual battery and felony failure to appear and received a total effective sentence of nine years. The factual basis, as recited by the prosecutor at the guilty plea hearing, is as follows:

[T]he alleged victim in this case [is] a five year old female child of [Mr. Stamey's] wife, then girlfriend. The allegation is that Mr. Stamey had the child rub

lotion on his penis when he was babysitting the child. Mr. Stamey has denied that. He was interviewed by Detective Dailey, he did make an admission that he had the child rub lotion on his body but that the child never saw his penis or neither touched his penis. In his statement he did say that he was sexually aroused by what the child was doing. So there's no confession to the allegation, but there is some corroboration of course of the child's testimony. Mr. Stamey has two prior convictions of a similar nature, a sexual battery and an attempted aggravated sexual battery conviction, which the State of course is going to use to enhance in this case, to impeach.

On March 9, 2004, the petitioner filed a motion to withdraw his guilty plea pursuant to Tennessee Rule of Criminal Procedure 32(f). On May 24, 2004, the trial court denied relief finding in essence that the petitioner's plea was voluntary. On May 27, 2004, the petitioner filed a pro se petition for post-conviction relief. Post-conviction counsel was appointed, an amended petition was filed, and a hearing was held.

At the hearing, the petitioner's defense counsel testified that he was appointed to represent the petitioner. Counsel recalled that due to the nature of the petitioner's case, it was continued for a lengthy period of time. Counsel stated that he met with the petitioner on several occasions to discuss the case against the petitioner. Counsel also recalled that he received all available discovery materials and discussed them with the petitioner.

Counsel testified that he did not file a motion to suppress the petitioner's statements made during a polygraph test because the petitioner did not admit to any unlawful sexual contact. Counsel said he and the petitioner discussed the fact that the state intended to use the petitioner's prior convictions listed on the enhancement notice to impeach the petitioner if he testified at trial and that these prior convictions were of a sexual nature. Counsel recalled that he was prepared to file motions objecting to the admission of the petitioner's prior convictions had the case gone to trial. Counsel stated that he was prepared for trial. Counsel also stated that the petitioner was adamant that he was not guilty of the charges against him.

Counsel testified that after the petitioner pled guilty a judgment was entered February 3, 2004. According to counsel, a corrected judgment was entered by the court on February 6, 2004. However, a few days after entry of the guilty plea, counsel was informed that the petitioner wanted to withdraw the plea. Counsel stated that after telling the petitioner that it would be difficult to withdraw the plea, he agreed to file a motion to withdraw the plea. Counsel admitted that he failed to timely file the motion to withdraw the guilty plea and, according to counsel's recollection, the trial court dismissed the motion because the motion was not timely filed.

Counsel testified that at the time of the plea hearing the petitioner did not exhibit any unusual behavior and appeared competent to enter the plea. Counsel asserted that "[t]he reason that [the petitioner] plead [sic] guilty was that I talked to him extensively about the evidence of these other crimes." Counsel stated that he could not recall whether he was informed that the petitioner was taking medication at the time of the plea. On cross-examination, counsel stated that the state's first

offer was ten years. Counsel also recalled that the victims of the petitioner's prior convictions were available to testify in support of the state's motion to admit the petitioner's prior convictions. According to counsel, the availability of these potential witnesses may have influenced the petitioner to enter the guilty plea.

The petitioner's wife testified that she was not present the day of the plea hearing and believed her husband was going to trial. She stated that counsel met with her and the petitioner three or four times before the plea. She also stated that she talked with counsel on the phone a few times. She recalled that prior to the plea hearing the petitioner told her he was taking Trazedone, but she indicated that she did not see him take the medication.

The petitioner testified that prior to the plea hearing he was incarcerated at the local jail. While in jail, he worked as a trustee from 6:00 p.m. to 6:00 a.m. As the petitioner explained, he was depressed and suffered from insomnia while incarcerated. Therefore, he started to take some medications. The petitioner testified that on the day of the plea hearing he had taken 75 milligrams of Trazedone, some penicillin, and some pain medication.

According to the petitioner, he met with counsel two or three times before his trial date on February 4, 2004 and did not want to plead guilty. On February 3, 2004, the date of his guilty plea hearing, he had just worked the 6:00 p.m. to 6:00 a.m. shift. Around 7:30 a.m., he took 150 milligrams of Trazedone. The petitioner stated that Trazedone made him dizzy and "puts me in a state of mind that I'm unaware of what I'm doing. It puts me practically to sleep somewhat." The petitioner further stated that Trazedone helped to stabilize the imbalance in his brain and helped him sleep. The petitioner then asserted that he stopped taking his medication five days after the plea hearing and became aware that he entered a guilty plea. As a result, on February 13, 2004, he called his wife, who called counsel. The petitioner stated that he did not hear from counsel until March 23, 2004. On cross-examination, the petitioner asserted that he was not truthful with the trial court on the day of the plea hearing because he had worked long hours the week prior, he was not sleeping correctly, and he was taking a high dosage of medication.

Following the hearing, the post-conviction court issued a written order denying post-conviction relief. The petitioner now brings this appeal.

### *Analysis*

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings is de novo with a presumption that the findings are correct. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001). Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Id.*

## Unknowning and Involuntary Plea

The petitioner contends that his guilty plea was not knowing or voluntary because he was on medication at the time of entry of the plea. A petitioner may successfully contest a conviction when his or her guilty plea is unknowing or involuntary. *See* Tenn. Code Ann. § 40-30-103; *Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). A plea is not “voluntary” if it results from ignorance, misunderstanding, coercion, inducements or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is “knowing” by questioning the defendant to make sure he or she fully understands the plea and its consequences. *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999); *Blankenship*, 858 S.W.2d at 904. When determining the knowing and voluntary nature of the guilty plea, the trial court must consider the totality of “various circumstantial factors,” including:

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

*Blankenship*, 858 S.W.2d at 904 (citations omitted). A petitioner’s solemn declaration in open court that his or her plea is knowing and voluntary creates a formidable barrier in any subsequent collateral proceeding because these declarations “carry a strong presumption of verity.” *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Upon review of the record, we conclude that the petitioner failed to prove by clear and convincing evidence that he was heavily medicated when he pled guilty. First, the record reflects that the petitioner previously pled guilty to charges similar to the current charge of aggravated sexual battery. Through counsel, the petitioner was aware that the state intended to use his prior convictions to impeach him should the case go to trial. According to counsel’s testimony, the petitioner pled guilty because he was concerned his prior convictions would be admitted at trial. Also, counsel stated that the petitioner did not exhibit any unusual behavior and appeared competent to enter the plea. Second, the petitioner failed to present sufficient evidence that he was under the influence of medication prescribed to him when he pled guilty. Although the petitioner produced a few illegible medication records indicating he took Trazadone and other medication, these records do not reflect dates or times when the petitioner took his medication. In fact, one of the medication records indicate the administration of Trazadone on December 2003 not February 3, 2004. Third, the transcript of the guilty plea hearing reveals that the petitioner affirmed that he was not under the influence of alcohol or drugs. The petitioner also affirmatively indicated that he was not suffering from any mental disease or defect. In addition, the petitioner responded affirmatively when asked if he understood the range of punishment for the particular charges against him. The petitioner further indicated that he was satisfied with counsel’s representation. The petitioner’s affirmative

responses during the plea colloquy demonstrate the fact that the petitioner was competent to enter a guilty plea. Accordingly, we conclude that the petitioner's plea was knowingly and voluntarily entered.

### **Ineffective Assistance of Counsel**

As a related matter, the petitioner contends that counsel was ineffective for failing to timely file a motion to withdraw the guilty plea. To establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Adkins v. State*, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994). A fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Strickland*, 466 U.S. at 697.

Although the petitioner demonstrated that his counsel did not timely file a motion to withdraw his guilty plea, the petitioner failed to demonstrate prejudice. Tennessee Rule of Criminal Procedure 32(f) provides:

A motion to withdraw a plea of guilty may be made upon a showing by the defendant of any fair and just reason only before sentence is imposed; but to correct manifest injustice, the court after sentence, but before the judgment becomes final, may set aside the judgment of conviction and permit the defendant to withdraw the plea.

In the instant case, the petitioner did not indicate a desire to withdraw his plea until after the imposition of his sentence. Therefore, the petitioner's guilty plea could only be withdrawn "to correct manifest injustice." Although not exhaustive, the withdrawal of a plea under the manifest injustice standard is warranted when:

(1) the plea was entered through a misunderstanding as to its effect, or through fear and fraud, or where it was not made voluntarily; (2) the prosecution failed to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), and this failure to disclose influenced the entry of the plea; (3) the plea was not knowingly, voluntarily, and understandingly entered; and (4) the defendant was denied the effective assistance of counsel in connection with the entry of the plea.

*State v. Crowe*, 168 S.W.3d 731, 742 (Tenn. 2005) (internal quotations omitted). When addressing the petitioner's request to withdraw his guilty plea, the trial court found that the petitioner had "unequivocally denied being under the influence of alcohol or stimulating drugs [when] he entered the plea," and that the plea was signed and final. The trial court also found that the petitioner pled guilty to a charge that carried a lesser sentence. The trial court concluded that the petitioner simply had a change of heart and was reluctant to serve his sentence, and therefore, the trial court denied the petitioner's motion to withdraw the guilty plea. In addition, the evidence adduced at the post-conviction hearing demonstrates that the petitioner had previously pled guilty to charges that were similar to the current charge, and he was aware that the state intended to use his prior convictions at trial. Therefore, according to our review of the record, the petitioner did not establish any basis which permits the withdrawal of his guilty plea based upon "manifest injustice." Accordingly, we conclude that the petitioner failed to demonstrate any prejudice resulting from counsel's failure to timely file the motion for withdrawal of the plea.

### **Illegal Sentence**

The petitioner also contends that the trial court improperly altered his judgment thus creating an illegal sentence. In his brief, the petitioner cites no authority for this allegation, but rather, he states "[t]here was no agreement from the petitioner either by waiver or otherwise to allow the court authority to alter, or amend the original judgment in any manner."

In our view, the trial court was simply correcting clerical errors in the judgment form. Pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure, "[c]lerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time." A review of the record reveals that the judgment form was corrected three days after the original judgment was entered. The original judgment form was altered only to the extent that the box "violent 100%" was marked, and the petitioner's pretrial jail credits were noted. Pursuant to Tennessee Code Annotated section 40-35-501(i), a person convicted of aggravated sexual battery must serve 100% of his or her sentence before becoming eligible for release, subject to the application of a maximum of 15% reduction. According to the transcript of the plea hearing, the petitioner affirmed that he understood the range of punishment for his convictions of aggravated sexual battery and failure to appear. Therefore, the trial court's notation of the petitioner's release eligibility and pretrial credits did not render the petitioner's sentence illegal. See *Marvin Anthony Matthews v. Charles C. Noles*, No. 02C01-9206-CC-00140, 1993 WL 46546, at \*2 (Tenn. Crim. App., at Jackson, Feb. 24, 1993),

*perm. app. denied* (Tenn. 1993) (stating that technical violations on judgment forms do not render a petitioner's confinement illegal if a valid conviction and sentence were imposed). Accordingly, the petitioner is not entitled to relief on this issue.

***Conclusion***

Based upon the foregoing analysis, we affirm the denial of post-conviction relief.

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J.C. McLIN, JUDGE